identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

B5

PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 03 2007

SRC 06 228 51229

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Maura Deadrick
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a medical practice. It seeks to employ the beneficiary permanently in the United States as a physician pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, the petitioner has overcome the director's concerns.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 18, 2004. The proffered wage as stated on the Form ETA 750 is $138,000 annually. On the Form ETA 750B, signed by the beneficiary on October 13, 2004, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have an establishment date in 1988 (the tax returns show a date of incorporation in 1998), a gross annual income of $4,679,494, an undisclosed net income and 39 employees. In support of the petition, the petitioner submitted the beneficiary's Form W-2 Wage and Tax Statements for 2004 and 2005 reflecting wages of $31,848 and $115,072 respectively. The petitioner also submitted its Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return for 2005, filed as a personal service corporation. The tax return provides the following information:

Compensation of officers (two listed on Schedule E)	$776,616
Net Income	($204,839)
Current Assets	$1

Current Liabilities	$115,636
Net current assets	($115,635)

The petitioner also submitted a letter from its accountant asserting that the petitioner hired the beneficiary on October 1, 2004; thus, the petitioner's annualized wages for 2004 were actually $127,393. The accountant further asserts that the petitioner's net loss in 2005 was achieved "through intentional tax planning for the personal service corporation" to avoid paying the 35 percent flat tax on corporate profits.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 9, 2006, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner submit its federal tax return for 2004 and evidence of wages paid to the beneficiary in 2006.

In response, the petitioner submitted its tax return for 2004 listing the following information. The tax returns reflect the following information for the following years:

Compensation of Officers	$691,500
Net income	($228,989)
Current Assets	$0
Current Liabilities	$24,288
Net current assets	($24,288)

In a new letter, the accountant asserts that tax law encourages a closely held corporation to minimize its profits to avoid "double taxation." The accountant further asserts that the petitioner assumed indebtedness in December 2004 "for the purchase of both fixed and intangible assets and the capital investment in a malpractice insurance cooperative group." In addition, the petitioner submits a bank letter indicating that the petitioner maintained an approximate average balance of $74,150 in 2004, $139,567 in 2005 and $97,687 in 2006. Finally, the petitioner submitted the beneficiary's pay statement for August 11, 2006 reflecting biweekly wages of $5,769, which annualizes to $149,994, and year-to-date wages of $99,230.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage in 2004 or 2005, and, on November 1, 2006, denied the petition.

On appeal, counsel asserts that the proffered wage should be prorated for 2004 as the priority date is October 18, 2004. In response to the director's concerns that the bank letter only discussed average balances, counsel notes that the individual balances for October, November and December 2004 are sufficient to cover the difference between the wages paid and the proffered wage. The petitioner submits the individual bank statements for those months. Counsel further asserts that the petitioner's bank balances in 2005 more than cover the difference between the proffered wage and wages paid,

also supported by the bank statements for all of 2005. Finally, counsel asserts that the petitioner's shareholders could cover any difference between the proffered wage and the funds available.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2004 or 2005. Rather, the difference between the proffered wage and the wages paid was $106,151.84 in 2004 and $22,927.62 in 2005.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner has not demonstrated that it paid the full proffered wage in 2004 or 2005. In these years, the petitioner shows a net loss and negative net current assets. The petitioner has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets.

To overcome this deficiency, counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not consider 12 months of income or wages paid towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income or wages paid towards paying the annual proffered wage. Nevertheless, in this matter, the beneficiary began working for the petitioner on or about the priority date and has submitted bank statements for the three months after the priority date showing sufficient sums ($85,674.78 in October, $110,967.56 in November 2004 and $85,674.85 in December) to cover the negligible difference between the wages paid ($31,848.16) and one quarter of the proffered wage ($34,500) or $2,651.84. We share the director's concern, not addressed on appeal, that the petitioner failed to include this cash on its Schedule L for 2004 and note that the petitioner's cash dropped to $16,429 in January 2005. It remains, however, that the bank statements do demonstrate that the petitioner had this cash available and the far lower balance in January 2005 is still considerably more than the $2,651.84 the petitioner must demonstrate it had the ability to pay in the final three months of 2004. Thus, the petitioner has demonstrated its ability to pay the proffered wage as of the priority date in 2004.

The bank statements for 2005 are less persuasive as they cover a much longer period, fluctuate significantly (with the highest balances being in the middle of the year) and must be balanced against the petitioner's current liabilities. As stated by the director, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. As with 2004, no explanation was provided for the petitioner's failure to include these balances as cash on its 2005 Schedule L.

Counsel's request that we consider the distributions to the petitioner's shareholders is more persuasive. Typically, money expended by a company, including on wages, are no longer available to

---

[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

pay the proffered wage. Thus, counsel's assertion that the petitioner's history of paying its employees should be considered is not persuasive. Moreover, a corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Thus, the assets of the petitioner's shareholders are typically not relevant.

Nevertheless, the petitioner has presented a plausible argument, fully consistent with the evidence, to demonstrate that peculiarities in the tax code create a unique circumstance for personal service corporations, as designated on the IRS Form 1120.

As in *Matter of Sonegawa*, 12 I&N Dec. at 612 (Reg. Comm. 1967), the CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage.

In the present matter, the petitioner has identified itself on IRS Form 1120 as a "personal service corporation." Pursuant to *Matter of Sonegawa, supra*, the petitioner's "personal service corporation" status is a relevant factor to be considered in determining its ability to pay. A "personal service corporation" is a corporation where the "employee-owners" are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation's taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. This in effect can reduce the negative impact of the flat 35% tax rate. Upon consideration, because the tax code holds personal service corporations to the highest corporate tax rate to encourage the distribution of corporate income to the employee-owners and because the owners have the flexibility to adjust their income on an annual basis, the AAO will recognize the petitioner's personal service corporation status as a relevant factor to be considered in determining its ability to pay.

As in the present case, substantially all of the stock of a personal service corporation is held by its employees, retired employees, or their estates. The documentation presented here indicates that Dr.

[redacted] and [redacted] jointly own 100 percent of the company's stock and split $776,616 in 2005.

CIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

In the present case, however, counsel is not suggesting that CIS examine the personal assets of the shareholders, but, rather, the financial flexibility that the employee-owners have in setting their salary based on the profitability of their personal service corporation medical practice. Clearly, the petitioning entity is a profitable enterprise for its owner. It is noted that their practice earned a gross profit of $4,679,494 in 2005. A review of the petitioner's gross profit and the amount of compensation paid out to the employee-owner confirms that the job offer is realistic and that the proffered salary of $138,000 can be paid by the petitioner.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the CIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2004 and subsequently. Therefore, the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.